United States Court of Appeals

for the Second Circuit

APPENDIX

74-1020

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. OSCAR LEE CHENNAULT,

Petitioner-Appellee,

against

HAROLD J. SMITH, Warden, Attica Correctional Facility, et al.,

Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

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Relevant Docket Entries.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
		JSS
12- 8-71	APPLICATION FILED FOR A WRIT OF HABEAS CORPUS.	1
1-21-72	Copy of letter of Clerk of Court filed dated Jan. 21 1972 addressed to Mr. Oscar Lee Chennault re forms to be submitted, etc.	2
2- 3-72	PETITION FILED FOR A WRIT OF HABEAS CORPUS (Printed Form)	3
3- 3-72	BY NEAHER, J. ORDER TO SHOW CAUSE FILED (1) The Atty. Gen., State of N.Y., as atty., for the respondent to show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued; etc. (See Order)	4
3- 3-72	Copy of letter of Clerk of Court filed dated March 3, 1972 addressed to Mr. Oscar Lee Chennault, re copy of order, etc.	5
6- 5-72	Letter of Oscar Lee Chennault filed dated May 30, 1972 addressed to this office, together with a reply from Clerk of Court dated June 5, 1972 addressed to said relator, stating that there has been no decision as yet, etc.	6 & 7
6-13-72	Affidavit of ROBERT S. HAMMER, Assistant Atty., Gen., State of N.Y., filed in opposition, etc., and letter of ROBERT S. HAMMER, Esq., filed dated June 9, 1972 addressed to NEAHER, J.	8 & 9
6-15-72	Letter from Oscar Lee Chennault dated 6-12-72 filed	10

Relevant Docket Entries.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
10-30-72	Letter of relator herein filed dated October 25, 1972 together with a reply from Clerk of Court dated Oct. 1972 stating that a correction of records has been made	11 & 12
11- 3-72	Motion for admittance to Bail pending Judgment, etc., filed	13
12- 1-72	By Neaher, J. Order filed that the above case be retitled: U.S. ex rel. Oscar Lee Chennault vs. Theodore Schubin, Warden, Ossining Correctional Facility, et al.	14
12-18-72	Letter of relator filed dated Dec. 13, 1972 addressed to Neaher, J.	15
2-14-73	Letter of relator herein filed dated Feb. 3, 1973 addressed to U.S.C.A., together with a reply from Clerk of Court dated Feb. 14, 1973, etc.	16
4-16-73	Letter of relator herein filed together with a reply from Clerk of Court dated April 16, 1973, etc.	17 & 18
5-15-73	Letter of relator herein filed together with a copy of letter of Clerk of Court dated May 15, 1973 addressed to relator, Oscar Lee Chennault re bail, etc.	19 & 20
8-27-73	Affidavit of Oscar Lee Chennault, relator herein filed	21
10-25-73	Memorandum and Order Filed. (By Neaher, J.) Petition for a writ of habeas corpus Granted. Petitioner will be released from custody unless the State within thirty days grants him a new trial So Ordered. (See Memo., etc.)	22

Relevant Docket Entries.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
10-25-73	Copy of letter of Clerk of Court filed dated Oct. 29, 1973 re enclosure of a copy of memo., to relator as well as Atty. Gen., State of N.Y., etc.	23
10-30-73	By NEAHER, J.—JUDGMENT dated 10-30-73 that the petition for a writ of habeas corpus is granted and the petitioner will be released from custody unless the State of New York within 30 days of the date of this judgment grants him a new trial filed. (Office of Asst. Atty. General Robert Hammer notified by telephone. Copy of judgment mailed to said office and to District Attorney's Office in Queens). MM	24
11-28-73	NOTICE OF APPEAL FILED.	25
11-28-73	Copy of Notice of Appeal was on this day mailed to Clerk U.S.C.A. MRB	
11-28-73	Copy of Notice of Appeal was on this day mailed to Mr. Oscar Lee Chennault c/o Parole Officer Santiago N.Y.S. Division of Parole, 260 E. 161st Street, Bronx, N.Y. 10451. MRB	
11-28-73	Instructions on preparation of Record on Appeal were on this day mailed to Hon. Louis J. Lefkowitz, Atty. Gen., State of N.Y. Two World Trade Center, N.Y., N.Y. 10047. MRB	

Relevant Docket Entries.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
11-28-73	Notice of motion filed for an order pursuant to Federal Rules of Appellate Procedure, Rules 8(a) and 23(c) staying the judgment of this Court, etc. (returnable Nov. 30, 1973 at 10:00 A.M.	26
12-10-73	By Neaher, J. Order filed on motion re stay, etc. Adjourned to Dec. 21, 1973 at 10:00 A.M., Ordered that the time provided to the State to retry petitioner be extended until the hearing of respondent's motion. George Allan Davidson, Esq., 1 Wall St., N.Y., N.Y. 10005, having consented to represent petitioner upon this motion as well as the appeal noticed by respondent, the court hereby appoints him as counsel for petitioner. So Ordered. (See Order)	27
12-11-73	Copy of letter of Clerk of Court filed dated Dec. 11, 1973 re enclosure of a copy of order, etc., cc: Robert S. Hammer, Assistant Atty. Gen., etc.	28
12-20-73	Affidavit of Oscar Lee Chennault filed in opposition, etc.	29
12-20-73	Memorandum filed in opposition, etc.	30
12-21-73	Before Neaher, J. Case called. Motion argued. Motion Denied. (Motion to maintain status quo)	

Application for Writ of Habeas Corpus (28 U.S.C. 2241 Et Seq.).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. OSCAR LEE CHENNAULT,

Petitioner,

against

THE STATE OF NEW YORK; WARDEN, Attica Prison, et al.,

Respondents.

To a justice of the United States District Court, Eastern District of New York, Brooklyn, New York.

LEGAL POINTS

1. Illegal Search and Seizure

2. Confession without Counsel

STATEMENT

1. I am presently incarcerated in the Federal Prison at Atlanta, Georgia, but am also in custody of the State of New York by way of an outstanding detainer warrant. See: Meadows v. New York, 426 F.2d 1176 (1971). The New York sentence was a term of five to ten years imposed in Queens Supreme Court, Queens, New York, on 5-21-64 (Bosch, J.).

2. That all records held by Honorable Vincent R. Mancusi, warden, Attica State Prison, and his subordinates,

and the Attorney General of New York State pertaining to the incarceration of this petitioner be produced in Court as of the specified date.

3. No previous application for the relief herein sought has been made.

STATEMENT OF THE CASE

This is an appeal from a judgment of the Supreme Court of New York, Queens County, Queens, New York, rendered 5-21-64, convicting petitioner after a trial by jury on 4-9-64, upon the charge of grand larceny, first degree. Petitioner was sentenced to five to ten years in State prison.

Notice of appeal was filed 5-26-64 and on 6-18-64 Motion for Counsel and to prosecute *in forma pauperis* was granted.

8-25-65 Brief in defense was filed by Legal Aid Society (Anthony F. Marra) with the New York Supreme Court, Appellate Division, 2nd Judicial Department.

10-20-65 said Court affirmed Judgment of the original court.

Petitioner subsequently was given permission to appeal to the New York Court of Appeals, and brief was filed; New York State Court of Appeals, in a split decision 10-12-67, stated: "The Judgment appealed from should be modified so as to direct a hearing upon the voluntariness of these statements by the defendant to the police pursuant to *People* v. *Huntly,* 15 N.Y. 2d 72, and, as so modified, affirmed."

On 2-2-68, a Huntly hearing was had in New York Supreme Court, Queens County, New York, and the decision of the Court was that "Statements made to the police were voluntary".

Application for Writ of Habeas Corpus (28 U.S.C. 2241 Et Seq.).

WHEREFORE, petitioner's rights having been exhausted in the Courts of New York State, he hereby makes his appeal to this United States District Court, Eastern District of New York, Brooklyn, New York, for a writ of Habeas Corpus freeing him from the detainer warrant presently filed against him and from further incarceration herein.

STATEMENT OF THE FACTS

Defendant-petitioner was indicted by the Queens County grand jury (New York City) for the crime of grand larceny, 1st degree.

At trial by jury the prosecution presented that on 9-20-63 the defendant stole from one Veronica Kane, at the Montank Freightways, 4502 25th Avenue, Astoria, Long Island, cash of $555.77 and a quantity of checks, all having been contained in a bank's deposit bag.

Five prosecution witnesses were called:

1. Alfred Toy, Manager of Montank Freightways, complaining witness, testified that on 9-20-63 he had a conversation with the defendant at Montank Freightways and that immediately thereafter the bank's deposit bag and its contents were missing.

2. John Avelin, partner of Montank Freightways, testified that a specific check made out to cash was in the bank's deposit bag.

3. Detective Greene of the 114th Precinct in Queens testified that on questioning the defendant regarding the check to cash the defendant admitted he had taken it from Montank Freightways.

4. Veronica Kane, bookkeeper at Montank Freightways, testified she prepared the bank's deposit bag and that after

the defendant left Montank Freightways the bag was no longer there.

5. Patrolman Hayes of the 80th Precinct, Brooklyn, testified concerning the recovery of the check and the arrest of the defendant.

CHRONOLOGICAL HISTORY

Patrolman Hayes on the afternoon of the 20th day September, 1963, along with his partner, Patrolman Brogran, both of the 80th Precinct, received a dispatch at approximately 3:00 p.m. concerning a possible holdup (and/or burglary) at 127 Lefferts Place, Brooklyn, New York.

In response Patrolman Hayes went to the Hotel and saw the defendant in the lobby. The female clerk there told him that she thought the defendant was the man who had attempted to hold her up on a previous occasion, and she thought the defendant was about to do it again. Hayes further testified that the clerk later changed her mind as to the defendant's involvement in the previous holdup; and she also told Hayes partner that she was not sure this was the man. Hayes himself was not aware as to when the first holdup occurred.

When Hayes questioned the clerk she told him there was another person in the washroom.

The record is not clear as to Patrolman Hayes actions in the washroom. At one time he testified that when he went into the washroom he found a man (not the defendant) washing his hands, and the check (the check to cash) on a windowsill and while at another time he testified that seeing a man in the washroom he first came out of the washroom with the man and then went back to search the washroom and then found the check.

Patrolman Hayes testified that the check to cash had nothing to do with the radio call he received; and that during the time Hayes was in the lobby the defendant did not go to the washroom or come out of it; nor was the defendant ever in the washroom to his knowledge . . . at one time Hayes testified that he did not question the defendant or the other man about the check. At another time Hayes said he questioned the two men about the check but he couldn't remember what was said.

Defendant and the other man were taken by Hayes to the 80th Precinct. Hayes could not remember the name of the other man. The two men were turned over to the 80th Squad in Brooklyn "for investigation", on the clerk's original complaint; that these two men had previously tried to hold her up. The defendant's car was moved by the Police from 127 Lefferts Place to in front of the 80th Precinct and it was then searched by Hayes. Hayes testified that he did not have a search warrant.

The record is not clear as to when the defendant himself was searched and the keys to the defendant's car taken from him; but the record shows that Patrolman Hayes made the search of defendant's car in front of the 80th Precinct and there found, in the trunk of the car, "A valise containing a suit and clothing which he believed was a 'vestry', i.e., a white collar with a dark front to it, and an identification card stating that the defendant was a member of the ministry.

DETECTIVE JOSEPH GREENE

Detective Joseph Greene of the 114th Precinct in Queens, the arresting officer in the case, testified that on 9-20-63 a.m. he went to the office of Montank Freightways and spoke to the complainant Alfred Toy. Greene's testimony revealed he first saw the defendant in the 114th Squad

Office in Queens at approximately 11:00 P.M. 9-20-63. He learned that the defendant was in the 80th Precinct in Brooklyn between 7 and 8 P.M. by a phone call.

The defendant was picked up from the Brooklyn precinct by two Queens detectives and brought to the 114th Precinct along with (1) the check and (2) the valise containing Minister's garb and (3a) $42.00 which was taken from the defendant.

Detective Greene testified that he was alone when he questioned the defendant; that to his knowledge the defendant never had the check in his possession. When asked if he knew how the police had come into possession of the check, the defendant's answer was "Some hotel or something, someplace in Brooklyn". He further stated he hadn't been aware of the other person (the one in the washroom). Concerning Greene's interrogation of the defendant, Greene testified:

> Q. You interrogated him in the squad room, didn't you? A. Yes, sir.
>
> Q. Was he handcuffed at that time? A. No, sir.
>
> Q. Was he seated or standing? A. Seated.
>
> Q. Where was the suitcase, the minister's collar, the money, as you were interrogating him? A. I believe the other property was on the desk and some was in the suitcase.
>
> Q. Had you previously been assigned to investigate the theft of money on September 20 from Montank Freightways? A. Yes, sir.
>
> Q. For what period of time did you interrogate Chennault? A. Maybe a half hour, forty-five minutes.
>
> Q. During the course of that interrogation you let him know that you had $42.00 of his in the drawer of your desk, didn't you? A. I didn't say the $42.00 was in the desk drawer.

Q. You said it was in the desk? A. I said it was on the desk.

Q. It was in the open, on your desk? A. Yes.

Q. And he knew that that was part of his property, that was taken from him, is that right? A. I asked him where the $42 came from.

Q. Right. A. And he told me it was, that that is what was left from the bag of money that he took from the Montank Freightways.

Q. Did you discuss with him the Minister's collar that was in the valise? A. Yes, sir.

Q.At that time? A. Yes, sir.

Q. What did you say to him about that? A. I asked him if he had worn that collar that day. He told me he did. I asked him if he had been to the Montank Freightways.

Q. Did you discuss with him the Minister's collar that was in the valise? A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. What did you say to him about that? I asked him if he had worn that collar that day. He told me he did. I asked him if he had been to the Montank Freightways to solicit money. He stated he was there. I asked him if he had taken a bag containing money from a cabinet or a chest in the office. He told me he did.

Q. Did you have a check made out to cash and drawn upon the account of Montank Freightways? A. Yes, sir.

Q. Did you show that to the defendant as you interrogated him in the 114th? A. Yes, sir.

Q. Did the defendant say anything to you about that? A. Yes, sir. He told me that he kept—I asked him why he kept this check and had thrown away the

other check. He told me he had kept this check because it was made out to cash.

Greene further testified that he questioned another man brought with the defendant to the 114th Precinct, but not about the check. Greene was not aware that this other man had been found in the washroom with the check. The defendant was booked by Greene at 2:00 A.M. on 9-21-63. Defendant was arraigned on 10-28-63.

ALFRED TOY

Complainant Alfred Toy of Montank Freightways identified the defendant as the man who entered his office on 9-20-63 seeking a "donation". Defendant wore the garb of a minister. Toy told the defendant that he couldn't give a donation without permission of his boss. The boss did not authorize Toy to make a donation but asked the defendant to make a formal request for funds through a letterhead.

Toy stated that the defendant left the office as the mailman entered. Toy further stated that about 11:00 a.m. the bookkeeper, Veronica Kane, asked where the bank's deposit bag was.

When they couldn't find the bank's deposit bag they called the police. This was about 30 minutes after the defendant and the mailman had left the office.

Toy stated he went to the 114th Precinct at about 1:00 a.m. of that day as a result of a call from Detective Greene; Toy said he was shown 2 colored people. Toy identified the defendant as the man who had been in the office.

MRS. VERONICA KANE

Veronia Kane, bookkeeper for Montank Freightways, testified that on 9-20-63 she prepared a bank deposit; that

the bag contained about $4,500.00 in checks and $555.00 in cash; one of said checks being the check to cash which she identified. She stated she put the bank deposit bag on the cabinet right outside Mr. Toy's office; that about 10:30 a.m. of that day a Minister entered the office requesting a donation. She identified the defendant as being the minister. She further testified that after the defendant left she discovered the bank deposit bag was missing. About 6:00 p.m. of that day she learned that the minister had been arrested by the police.

At this stage defendant moved to suppress certain evidence on the basis that the evidence was seized against the defendant's will and without a warrant. This evidence consisted of "the checks", auto keys, briefcase, identification card, and a sum of money; and any information obtained through the use of such items. A hearing on defendant's motion to suppress on 1-27-64 resulted in the Court (Conroy, J.) granting the motion in toto.

Defendant through counsel moved to inspect the minutes of the grand jury or, in the alternative, to dismiss the indictment. On 2-17-64 the motion was denied. 3-23-64 defendant went on trial. This resulted in a mistrial and on 3-9-64 defendant's counsel again moved to suppress the evidence. 4-1-64 the Court granted this second motion to suppress to the extent that it vacated its decision of 1-27-64 and directed that the motion to suppress be referred to the trial part of the court for a hearing. 4-8-64 Court's decision was: the objects seized by the police by reason of the search of defendant's car could not be used upon the trial of the indictment and any admissions of the defendant regarding these articles was suppressed.

The defendant however, found that the check was not the subject of the illegal search and seizure and was therefore admissable, and any statements made by the defendant relating to "the check" was admissable.

Application for Writ of Habeas Corpus (28 U.S.C. 2241 Et Seq.).

On 4-8, 9-64 defendant was found guilty of grand larceny in the first degree after a trial by jury.

ARGUMENTS

Defendant-petitioner repeats each and every contention that he made in his appeal through the Supreme Court of the State of New York, Appellate Division, Second Judicial Department; and the New York Court of Appeals. They are as follows:

1. On 1-27-64 and 4-18-64 the Court after hearing ruled that the search of defendant's car was illegal since no warrant was obtained. No permission had been given by defendant for the search of his car. The Court (Queens County) on 1-27-64 ruled all evidence, including the check, was illegally obtained. For reason not clear in the record defendant through counsel subsequently moved to suppress this same evidence. 4-8-64 the Court ruled all evidence obtained from the search and statements relating to the evidence were inadmissable; but the check and relating statements were admitted.

In the absence of defendant's "confession" there is not one shred of evidence connecting the defendant with the check.

Weeks v. *United States,* 232 U.S. 383 (1913)—The Supreme Court said: "Any evidence obtained as a result of illegal searches should not be presented in evidence."

Silverthorne v. *United States,* 251 U.S. 385, 392 (1920)—The Supreme Court said: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

People v. *Robertson,* 239 N.Y.S. 2d 373 (1963); *Harris* v. *State,* 15 Tex. App. 629; *State* v. *Simmons,* 39 Kan. 262,

18 p. 177; *Sherman* v. *United States,* 356 U.S. 369 (1958). *United States* v. *Consolidated Laundries Corp.,* 291 F.2d 563 (2nd Cir. 1961).

Defendant's confession ought here to be found inadmissable as a matter of law.

All of defendant's admissions (statements and confessions) were made without counsel.

Escobedo v. *Illinois,* 378 U.S. 478 (1964); *Gideon* v. *Wainwright,* 372 U.S. 342; *Spano* v. *New York,* 360 U.S. 315, 327; *Crooker* v. *California,* 357 U.S. 433 (1958); *People* v. *Dorado,* 394 F.2d 952 (1964).

3. Circumstances surrounding the defendant's detention and formal arrest, as well as unreasonable delay in arraignment, are further support for the inadmissability of defendant's confessions.

Defendant was arrested at 3:00 P.M. 9-20-63 and he was not arraigned until 10-28-63—THIRTY-EIGHT DAYS AFTER ARREST. This is in direct violation of section 165 of the New York Code of Criminal Procedure and the United States Constitution.

Defendant was in the hands of the New York City Police Department for over (14) fourteen hours before he was formally charged with a crime (booked).

DECISIONS OF NEW YORK STATE COURT OF APPEALS

The New York State Court of Appeals affirmed the judgment of the original court by split decision, Chief Justice Fuld and Justice Breitel dissenting. Following is the dissenting opinion which defendant asks this court to aver.

The defendant's conviction should be reversed since it was based upon inculpatory statements stemming from evidence concededly illegally obtained.

Application for Writ of Habeas Corpus (28 U.S.C. 2241 Et Seq.).

On September 20, 1963, two detectives went to a hotel in response to a telephone call from a clerk that she had just seen a man who had previously attempted to rob her. The defendant was in the lobby of the hotel and although the clerk at first indicated that it was he who had attempted to hold her up, she later acknowledged that she was not sure. The matter was not pursued further and nothing came of the charge. In the course of their investigation, however, the police officers discovered an unidentified man in the hotel washroom and found a check made out to the order of cash on the window sill of the washroom. This check, it developed, was one of a number which earlier in the day had been stolen along with cash, from the office of Montank Freightways, by a man dressed in clerical garb. Both the defendant and the unidentified man (not connected with the defendant in any way) were taken by the police to the station house for further investigation.

Upon arrival at the station house, the police searched the defendant and found a set of keys for an automobile. They located the defendant's car which had been parked near the hotel and opened the trunk and examined its contents. This search, effected without a warrant and concededly unlawful, yielded a valise containing clerical garb and a card identifying the defendant as a member of the ministry. Armed with such illegality seized articles, the police proceeded to confront the defendant with them and succeeded in procuring from him inculpatory statements, culminating in an admission that he had stolen the check (found in the washroom) from Montank Freightways.

It is true, as noted in the Court's opinion, that the check was not itself illegally obtained but the fact is that the defendant was connected with, and implicated in, the theft solely by his confession which was procured from him

through use of the illegally seized items. This appears, indisputably, from the minutes of the hearing on the motion to suppress the evidence. Thus, the detectives who had questioned the defendant, testified that he questioned him about the minister's collar which had been illegally removed from the auto; this is the testimony:

> Q. Did you discuss with him the minister's collar that was in the valise? A. Yes, sir.
>
> Q. At that time? A. Yes, sir.
>
> Q. What did you say to him about that? A. I asked him if he had worn that collar that day. He told me he did. I asked him if he had been to the Montank Freightways to solicit money. He stated he was there. I asked him if he had taken a bag containing money from a cabinet or a chest in the office. He told me he did.

Then, in answer to the questions—Quoted in the court's opinion (pp. 2-3):

1. I note that the court, following a motion to suppress the use of items as evidence (Code Crim. Pro., S13-C), held that the property had been illegally seized.

Whether he had the "washroom" check and whether he had shown it to the defendant "as (he) interrogated him" in the station house, the officer stated that he had and that the defendant admitted that he had stolen the check from Freightways.

There can be no doubt that the exclusionary rule announced by the Supreme Court in *Mapp* v. *Ohio,* 367 U.S. 643, proscribes the use not only of items illegally seized but also of evidence which stems from their use. (See: *People* v. *Rodriquez,* 11 N.Y. 2, 279, 286; *Silverthorng Lumber Co.* v. *United States,* 251 U.S. 385, 392.)

Wong Sun v. *United States,* 371 U.S. 471, 485. Our holding in the *Rodriquez* case is particularly pertinent (11 N.Y. 2d at p. 286).

"(T)he rule announced in *Mapp* v. *Ohio,* 367 U.S. 643, renders inadmissable not only the items (illegally) obtained, but any evidence which stems from their use. As the Supreme Court put it, the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.

* * * If knowledge of (facts) is gained from an independent source they may be proved like any other, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed. *Silverthorne Lmbr. Co.* v. *U.S.,* 251 U.S. 385, 392 (other cases cited). In short, the exclusionary rule covers not only the evidence illegally obtained, but the product of the unlawful search as well. The underlying rationale is that government may not violate the constitutional guarantee (U.S. Const. 4th Amend.) and "use the fruits of such unlawful conduct to secure a conviction". *Walder* v. *United States,* 347 U.S. 62, 64-65, supra. And obviously, it matters not that these "fruits" happen to be confessions rather than some other type of evidence. (Cf. *Costello* v. *United States,* 365 U.S. 265, 278-280, supra.)

In the light of this rule, it follows that the defendant's confession, as well as his other statements, procured as they were through use of this illegally seized articles, should not have been used as evidence against him.

The Judgment and conviction should be reversed and a new trial granted.

Application for Writ of Habeas Corpus (28 U.S.C. 2241 Et Seq.).

CONCLUSION

Wherefore, defendant petitioner begs this court to reverse the judgment in this instant cause of action and that this petitioner be granted his freedom; or for any and other relief as this court may deem just and proper. Petitioner has no further motions pending in New York State Courts.

No previous application for the relief herein sought has ever been made.

Respectfully submitted:

OSCAR L. CHENNAULT
OSCAR LEE CHENNAULT, pro se
Petitioner

(Sworn to by Oscar Lee Chennault, November 30, 1971.)

Petition for Writ of Habeas Corpus by Person in State Custody.

1. Place of detention: Atlanta, Ga. Federal Penitentiary.

2. Name and location of court which imposed sentence: Queens Supreme Court, Queens, New York.

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) Indictment number: 1140-63

   (b)

   (c)

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) Date imposed: 5/21/64

   (b) Term: five to ten years (5 to 10) yr.

   (c)

5. Check whether a finding of guilty was made

   (a) after a plea of guilty .....

   (b) after a plea of not guilty V

   (c) after a plea of nolo contendere .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

   (a) a jury V

   (b) a judge without a jury .....

7. Did you appeal from the judgment of conviction or the imposition of sentence? Yes.

Petition for Writ of Habeas Corpus by Person in State Custody.

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:
Queen Supreme Court

i. Appellate Division 2nd Judicial Department

ii. State Of New York Court Of Appeals

iii.

(b) the result in each such court to which you appealed:

i. Affirmed

ii. Affirmed

iii. Affirmed Huntley Hearing

(c) the date of each such result:

i. 10/20/65

ii. 10/12/67

iii. 2/2/68

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. People v. Huntley (15 N.Y. 2d 72).

ii. Mapp v. Ohio (367 U.S. 643)

iii. Wong Sun v. United States (371 U.S. 471-485)

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

Petition for Writ of Habeas Corpus by Person in State Custody.

10. State concisely all the grounds on which you base your allegation that you are being held in custody unlawfully:

    (a) Illegal Seach and Seizure

    (b) Confession without counsel

    (c)

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

    (a) Defendant-Petitioner repeats each and every contention that he made in his appeal through the Supreme Court of the State of New York, Appellate Division, Second Judicial Department; and the New York Court of Appeals.

    They are as follows:

    On 1/27/64 and 4/18/64 the Court after hearing ruled that the Search of defendant's car was illegal since no warrant was obtained. No permission had been given by defendant for the search of his car. The Court (Queens County) on 1/27/64 ruled all evidence, including the check, was illegally obtained for reason not clear in the record defendant through counsel subsequently moved to suppress this same evidence. 4/8/64 the Court ruled all evidence obtained from the search and statements relating to the evidence were inadmissable; but the check and relating statements were admitted.

    In the absence of defendant's "confession" there is not one shred of evidence connecting the defendant with the check.

(b)

(c)

12. Prior to this petition have you filed with respect to this conviction

(a) any motion in State court for a new trial? No.

(b) any petition in State court for a writ of error *coram nobis* or any motion in the nature of *coram nobis*? No.

(c) any petitions in State or Federal courts for habeas corpus? No.

(d) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.

(e) any other petitions, motions or applications in this or any other court? No.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

i.

ii. X

iii.

iv.

(b) the name and location of the court in which each was filed:

i.

ii.

iii. X

iv.

(c) the disposition thereof:

i.

ii.

iii. X

iv.

(d) the date of each such disposition:

i.

ii.

iii.

iv. X

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. Illegal search and seizure

ii. Confession without counsel

iii.

(b) the proceedings in which each ground was raised:

i. Direct appeal

ii. Huntley hearing

iii.

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a)

(b) X

(c)

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? ?

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No.

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. T. Britt

ii. Anthony F. Marra

100 Centre Street, New York, 100013

iii. Paul J. Luckern

277 Park Avenue, New York 10017 N. Y.

(b) the proceedings at which each such attorney represented you:

i. ?

ii. Appeal (and) Appellate Division

iii. New York Court of Appeals

19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? .....

OSCAR LEE CHENNAULT
Signature of Petitioner

(Verified by Oscar Lee Chennault, January 31, 1974.)

Affidavit in Opposition to Application for Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ROBERT S. HAMMER, being duly sworn, deposes and says:

I am an Assistant Attorney General in the office of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for respondents herein. I make this affidavit in opposition to petitioner's application for a writ of habeas corpus.

On May 21, 1964, petitioner was sentenced to 5 to 10 years imprisonment following his conviction in Supreme Court, Queens County, by a jury of grand largeny (Indictment #1140/1963). The conviction was affirmed by the Appellate Division, 25 A.D. 2d 718 (2d Dept. 1966), but modified by the Court of Appeals to the extent of directing a post trial "Huntley" hearing to determine the voluntariness of incriminating admissions by petitioner, 20 N.Y. 2d 518 (1967).

After the hearing, the admissions in question were found to be voluntary. The Appellate Division affirmed. 32 A.D. 2d 893 (2d Dept. 1969). It is not clear from the petition whether leave to appeal to the Court of Appeals has been sought and denied.

In the instant proceeding, petitioner seeks to relitigate the findings of voluntariness as well as the admissibility in evidence of admissions about a check that he had stolen.

Affidavit in Opposition to Application for Writ of Habeas Corpus.

The record of the Huntley hearing indicates by more than a fair preponderance of the evidence, *Lego* v. *Twomey*, —— U.S. ——, 30 L. Ed. 2d 618 (1972), that the incriminating admissions made by him to police officers were made voluntarily. Petitioner has failed to show that the state hearing was other than fair and adequate no further hearing is required. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

The crucial question in this case is, however, not the voluntariness of admission in the usual sense, but whether the admissions concerning the check were "fruit of the poisoned tree" because in addition to the stolen check which had been lawfully seized, petitioner had also been confronted with evidence that was later suppressed as illegally obtained.

Th New York Court of Appeals by a five to two vote held that the admissions concerning the check were not tainted by any admissions triggered by illegally obtained evidence. We submit that that decision was correct. *United States* v. *Knight*, 395 F. 2d 971 (2d Cir. 1968); *cf. Wong Sun* v. *United States*, 371 U.S. 471, 484-87 (1963).

Respondents submit herewith for the Court's consideration a copy of the Huntley hearing minutes (February 2, 1968), and the decision of Mr. Justice Bosch dated February 5, 1968 as well as the minutes of trial held April 29, 1964, sentence imposed May 21, 1964, pre-trial suppression hearings held January 27, 1964 and April 7, 1964, the decision in said motion dated April 8, 1964 and the minutes of a mistrial dated March 2 and 3, 1964. The foregoing are the property of the District Attorney of Queens County and have been loaned to the Attorney General's office for this purpose.

WHEREFORE, it is respectfully requested that the petition be dismissed.

(Sworn to by Robert S. Hammer. June 9, 1972.)

Memorandum and Order.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. OSCAR LEE CHENNAULT,

Petitioner,

against

HAROLD J. SMITH, Warden, Attica Correctional Facility, et al.,

Respondents.

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71 C 1588

APPEARANCES:

OSCAR LEE CHENNAULT,
Pro Se

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the State
of New York,
Attorney for Respondents

By ROBERT S. HAMMER, Esq.
Assistant Attorney General

NEAHER, District Judge.

Petitioner Oscar Lee Chennault, presently incarcerated in the Attica Correctional Facility, applies for a writ of habeas corpus claiming that his conviction of grand larceny first degree after a jury trial in the New York Supreme Court, Queens County, on April 9, 1964 is constitutionally invalid. He was sentenced to imprisonment for five to ten years which he has begun serving after recently

completing an apparently unrelated federal sentence.[1] On May 21, 1964 his conviction was affirmed by the Appellate Division without opinion, 25 A.D.2d 718, 268 N.Y.S.2d 558 (2d Dept. 1966), and subsequently by the Court of Appeals in an opinion which, however, directed a *Huntley*[2] hearing to determine the voluntariness of incriminating statements made by petitioner to the police, *People* v. *Chennault,* 20 N.Y.2d 518, 232 N.E.2d 324, 285 N.Y.S.2d 289 (1967). Chief Judge Fuld and Judge Breitel, dissenting, voted to reverse and order a new trial on the ground that petitioner's conviction "was based upon inculpatory statements stemming from evidence concededly illegally obtained." 285 N.Y.S.2d at 292. Following the *Huntley* hearing held in February 1968, the trial court found that petitioner's statements to the Police were made voluntarily. The Appellate Division affirmed, again without opinion, 32 A.D.2d 893, 302 N.Y.S.2d 740 (2d Dept. 1969). It is unclear from the papers whether leave to appeal to the Court of Appeals was subsequently sought and denied.

Petitioner's attack on his conviction focuses mainly on the constitutional defect noted by Chief Judge Fuld in *People* v. *Chennault, supra,* viz.,

> . . . the defendant's incriminating statements stemmed directly from the use of the illegally seized articles, and, accordingly, his admission should not have been received and used as evidence against him. 285 N.Y.S.2d at 294.

Although facts relevant to that issue appear in the Court of Appeals opinions, a chronological restatement of the history of the case gleaned from State court records seems desirable in view of petitioner's broadscale challenge to the fundamental fairness of the proceedings against him.

On the morning of September 20, 1963 a man wearing clerical garb walked into the office of Montauk Freight-

ways in Queens and asked the manager for a donation. After being refused, the man walked out. Shortly thereafter the company's bookkeeper noticed that the daily bank deposit pouch, containing the previous day's receipts of cash and checks, was missing from the top of a file cabinet located just outside the manager's office. The bookkeeper called this to the manager's attention and when a search failed to turn up the pouch, the loss was reported to the police. The manager and bookkeeper testified at petitioner's trials and identified him as the minister.

Neither could, of course, say he had taken the pouch but the bookkeeper was able to identify a check made out to cash, hereinafter referred to, as part of its contents.

Petitioner came to the attention of the police on the afternoon of September 20, 1963 as the result of what the record indicates to be a false alarm. At about 3:00 p.m. that day two radio car policemen responded to a call concerning a possible holdup in a Brooklyn hotel. The hotel clerk pointed out petitioner, who was in the hotel lobby, as a man she claimed had previously attempted to hold her up at the hotel and said she feared another holdup. According to the investigating officer, however, "then she changed her mind and said she wasn't too sure."[3] The clerk also told the officer there was another man in the washroom, adjacent to the lobby. The policeman investigated and found an unidentified man washing his hands, whom he turned over to his fellow officer. He then returned to the washroom and discovered a check lying on a windowsill. The check was subsequently identified by the bookkeeper of Montauk Freightways as having been in the pouch stolen earlier that day. The officer testified in a suppression hearing that at the time he had no knowledge or information that the check pertained to a crime and that he had never seen petitioner in the wash-

room. Nor does the record show any link between petitioner and the unidentified man found in the washroom.

Petitioner and the other man were frisked and taken in the patrol car to the 80th precinct in Brooklyn "for investigation only" on the hotel clerk's complaint. Neither man was questioned by the policemen, both of whom retired from the scene when their tour of duty ended at 4:00 p.m. A car belonging to petitioner, parked near the hotel, was driven by one officer to the 80th precinct, where it was subsequently searched without a search warrant. The search produced a valise containing clerical garb as well as a card identifying petitioner as a member of the ministry. According to the detaining officer, everything was turned over to the 80th precinct's detective squad which took charge of the matter.

The record is blank as to what occurred in the 80th precinct while petitioner was detained there from 4 p.m. until he was turned over to Queens detectives several hours later that evening. Detective Greene of Queens, who was in charge of the Montauk Freightways theft investigation, testified in a pre-trial suppression hearing that he first saw petitioner in Queens about 11 p.m. on September 20, 1963. This was after he "received a call from some detectives in Brooklyn precinct. They informed me that they had this Chennault and that he had a check on him that belonged to the Montauk Trucking Co."[4] Greene denied being informed by the Brooklyn detectives that petitioner had made any statements about the case but acknowledged that the check, a suitcase or valise containing a clerical collar, and $42 cash, apparently taken from petitioner, was sent out from Brooklyn.

Detective Greene testified he interrogated petitioner for approximately 30 to 45 minutes in the squad room of the 114th precinct in Queens. So far as appears from the record, this was the first interrogation of petitioner by the

police. Petitioner had then been in police custody for over seven hours, although he had not been arrested. The interrogation was conducted in plain view of the items illegally seized from petitioner's car, some of which were lying on the desk in the squad room. Petitioner was first questioned about the clerical garb seized from the automobile, as to which he made certain admissions.[5] He was booked for the Montauk Freightways theft at 2 a.m. on September 21 and arraigned on a grand jury indictment on October 28, 1963.

A suppression hearing was held on January 27, 1964, and a first trial before a second judge ended in a mistrial on March 3, 1964 before submission to the jury. A second suppression hearing was held on April 7, 1964. He was retried before another jury and a third trial judge on April 8 and 9, 1964 and found guilty of the theft. At both suppression hearings prior to these trials the articles found in petitioner's car were ruled to have been illegally seized and not admissible as evidence of the prosecution's case. Consequently, petitioner's oral admissions as to the contents of the vehicle were also excluded. The check, however, was held not to be the subject of an illegal search and seizure and, hence, admissible, along with petitioner's oral statements relating thereto.[6]

While not disputing the admissibility of the check per se, petitioner contends that his admissions to Detective Greene relating thereto should have been excluded because (1) they were the tainted fruit of illegally obtained admissions relating to the unlawfully seized clerical garb and identification card; (2) they were made without benefit of counsel; and (3) they were attributable to coercive circumstances surrounding his detention and formal arrest, as well as unreasonable delays in booking and arraignment.

As already noted, petitioner's first and principal contention stated above was flatly rejected by a divided New York

Court of Appeals in *People* v. *Chennault, supra.* That Court's majority determination that the admissions relating to the check were not excludable does not necessarily bind this court. *Townsend* v. *Sain,* 372 U.S. 293, 318 (1963).[7] See also Note, Developments in the Law, Federal Habeas Corpus, 83 Harvard L. Rev. 1038, 1121-40 (1970). If this court's independent review of the record presented by the State reveals a reasonable possibility that petitioner's conviction resulted from a violation of his federal constitutional rights, that conviction cannot stand. *Fahy* v. *Connecticut,* 375 U.S. 85 (1963).

Ever since *Mapp* v. *Ohio,* 367 U.S. 643 (1961), which predated petitioner's arrest, State as well as federal prosecutions have been subject to the so-called "exclusionary rule", which forbids the use not only of items seized in violation of the guaranties of the fourth amendment but also evidence which stems from their use. Cf. *United States ex rel Foreman* v. *Casseles,* 311 F. Supp. 526, 527 (S.D.N.Y. 1970).

Numerous cases have recognized confessions or admissions as "fruit" of an illegal search and seizure. *Wong Sun* v. *United States,* 371 U.S. 471, 485-87 (1963); *Ruiz* v. *Craven,* 425 F.2d 235, 236 (9 Cir. 1970); *Amador-Gonzalez* v. *United States,* 391 F.2d 308, 318 (5 Cir. 1968); *Barnett* v. *United States,* 384 F.2d 848, 862 (5 Cir. 1967); *United States* v. *Nikrasch,* 367 F.2d 740, 744 (7 Cir. 1966); *Hall* v. *Warden,* 313 F.2d 483 (4 Cir. (*en banc*), *cert. denied,* 374 U.S. 809 (1963); *Takahashi* v. *United States,* 143 F.2d 118, 122 (9 Cir. 1944); *Nueslein* v. *District of Columbia,* 115 F.2d 690 (D. C. Cir. 1940); cf. *Fahy* v. *Connecticut,* 375 U.S. 85, 90 (1963); *Ker* v. *California,* 374 U.S. 23, 30 (1963). Verbal evidence which derives so immediately from an unlawful entry or an unauthorized arrest is no less the fruits of an unwarranted intrusion. *Wong Sun* v. *United States, supra* at 486.

The court is also mindful that the exclusionary rule has been the subject of much controversy and should not be

applied mechanistically. See, *e.g., Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973) (Powell, J. concurring). "Courts must neither so narrow the rule as to impair its presumed deterrent effect nor expand it in such a way that in order to achieve a marginal increment in deterrence, society will pay too high a price." *United States* v. *Friedland,* 441 F.2d 855, 861 (2 Cir.), *cert. denied,* 404 U.S. 867 (1971).

The standard for determining the applicability of the exclusionary rule expressed in *Wong Sun* and subsequently followed in numerous cases is whether, granting establishment of the primary illegality, the evidence to which objection was made was obtained by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.[8] *Wong Sun* v. *United States, supra* at 487-88, citing Maguire, Evidence of Guilt, 221 (1959). Thus, if challenged evidence was also obtained from an independent source or if the connection between the illegality and the evidence was so attenuated as to dissipate the taint, its use at trial does not violate constitutional guarantees.

Here, it is undisputed that petitioner's automobile was illegally searched and his clerical garb illegally seized. It is also undisputed that when confronted with the garb petitioner confessed to the crime, while being interrogated under police custody. Subsequent questions (as reflected in the transcript of the April suppression hearing) during the same interrogation concerning the check found at the hotel in Brooklyn elicited further admissions, an inseparable sequence clearly stated in the opinion of the Court of Appeals majority.

Petitioner's underlying premise is that he would not have made the admissions as to the check had he not been aware of the illegal search and had he not already made admissions following the discovery of the clerical garb. He notes

that there was no other item of evidence tying him to the check or the crime aside from his earlier admissions.

Despite the fact that petitioner's admissions related to different items of evidence, it is impossible on the record to view the check admissions as resulting from an independent lawful source of information or evidence. Cf. *Wong Sung* v. *United States, supra* at 487. The record clearly demonstrates a continuum of interrogation surrounding the clerical garb and the check. Petitioner's admissions as to the garb effectively laid the foundation for further questioning as to the check. And his admissions as to the latter can only be viewed as logically compelled by his earlier admissions. Compare *United States* v. *Brandon*, 467 F.2d 1008 (9 Cir. 1972). In fact, absent the illegal search and seizure there was no basis at all for holding petitioner for seven hours and interrogating him concerning the Montauk Freightways theft.

The court is constrained to conclude, therefore, that petitioner's admissions were the product of an illegal search and seizure and earlier tainted admissions. An evidentiary hearing on petitioner's claim is unnecessary, *Townsend* v. *Sain, supra* at 318, since the undisputed facts in the record clearly indicate that the State courts improperly allowed petitioner's admissions into evidence in violation of his fourth amendment rights, applicable under the due process clause of the fourteenth amendment. Compare *Amador-Gonzalez* v. *United States, supra* at 318, with *Barnett* v. *United States, supra* at 861-62. See, generally, Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 607-611 (1968).

Accordingly, peitioner's conviction cannot stand. *Ruiz* v. *Craven, supra* at 236; *Amador-Gonzalez* v. *United States, supra* at 319; *United States* v. *Nikrasch, supra* at 744; *Nueslein* v. *District of Columbia, supra* at 696.

In view of the foregoing conclusion, extended consideration of petitioner's remaining contentions is unnecessary. The right to counsel during police interrogations established in such landmark cases as *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), and *Miranda* v. *Arizona,* 384 U.S. 436 (1966), is not retroactive and does not apply to cases tried before June 22, 1964. *Johnson* v. *New Jersey,* 384 U.S. 719, 721 (1966). Petitioner's trial took place on April 8 and 9, 1964. Thus his case is governed by earlier law, and "[p]rior to 1964, the refusal of police or other interrogators to permit the subject of interrogation to consult with counsel, even in the face of a specific request to see a particular available lawyer, was regarded as only part of the 'totality of circumstances' determining the voluntariness of a statement." McCormick, Evidence (2d ed.), at 324.

While petitioner claims that the circumstances surrounding his interrogation should invalidate his admissions, he mentions no specific facts in his petition, and appears to be seeking only to reargue the general voluntariness of his statements to the police. The relevant test as to voluntariness in pre-*Escobedo* cases, according to *Johnson* v. *New Jersey, supra* at 730, is to be found in *Haynes* v. *Washigton,* 373 U.S. 503, 513 (1963):

> "[T]he question in each case is whether the defendant's will was overborne at the time he confessed," *Lynumn* v. *Illinois,* 372 U.S. 528, 534. "In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort." *Wilson* v. *United States,* 162 U.S. 613, 623. See also *Bram* v. *United States,* 168 U.S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all the attedant circumstances.

A close review of the record, in particular the transcript of the *Huntley* hearing, provides no reason for disturbing the trial judge's determination that petitioner's will had not been overborne at the time he made his statements. Petitioner received a full and fair State hearing which dealt completely with general voluntariness, and a federal evidentiary hearing is not required. *Townsend* v. *Sain, supra* at 313, cf. *United States ex rel. Johnson* v. *Department of Correctional Services,* 461 F.2d 956, 961 (2d Cir. 1972).[9]

Petitioner also contends that "unreasonable delay in arraignment [is] further support for the inadmissibility of [his] confessions." He argues that the delay is in direct violation of § 165 of the New York Code of Criminal Procedure[10] and the United States Constitution. However, the statements in question were made prior to any delay in arraignment and cannot be attributed thereto. *United States ex rel. Candelaria* v. *Mancusi,* 284 F.Supp. 171, 172 (S.D.N.Y. 1968); *People* v. *Scully,* 4 N.Y.2d 453, 151 N.E.2d 861, 176 N.Y.S.2d 300 (1958).

In addition, petitioner raises a 14-hour delay between arrest and being formally charged with a crime. Although there is some question as to when exactly the arrest took place, the record is clear that petitioner was booked no more than 11 hours after the policemen first received the dispatch as to the possible holdup in the hotel at 3:00 p.m. In any case, the trial judge found in the *Huntley* hearing that the detention was not unreasonable, relying upon *United States* v. *Vita,* 294 F.2d 524 (2 Cir. 1961), *cert. denied,* 369 U.S. 823 (1962). Such a finding was within his discretion. See *People* v. *Briggs,* 36 A.D.2d 790, 319 N.Y.S.2d 374 (3d Dept. 1971); *People* v. *Pounds,* 35 A.D.2d 969, 317 N.Y.S.2d 884 (2d Dept. 1970).[11] Therefore, the court again defers to the trial judge's findings. *Townsend* v. *Sain, supra* at 318.

It follows that the petition for a writ of habeas corpus must be, and it is granted. Petitioner will be released from custody unless the State, within thirty (30) days, grants him a new trial.

So ordered.

/s/ EDWARD R. NEAHER
U.S.D.J.

Dated: Brooklyn, N.Y.
October 25, 1973

FOOTNOTES

[1] When this petition was filed petitioner, then in federal prison in Atlanta, Georgia, was also in "custody" of the State of New York under an outstanding detainer warrant on the Queens conviction and thus eligible to challenge that conviction in a federal habeas corpus proceeding. *United States ex rel. Meadows* v. *New* York, 426 F.2d 1176 (2 Cir. 1970), *cert. denied,* 401 U.S. 941 (1971). Under *Braden* v. *30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973), this court had jurisdiction over petitioner's application.

[2] *People* v. *Huntley,* 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965).

[3] Transcript of Hearing to Suppress Evidence, January 27, 1964, p. 5.

[4] Transcript of Hearing on Motion to Suppress Evidence, April 7, 1964, p. 33.

[5] Id. at 35-37.

[6] The trial court permitted Detective Greene to testify over defense objection as follows:

> "Q. Now, officer, I show you People's Exhibit 1 for Identification and I ask you, do you recognize it? [referring to the check.]
>
> "A. Yes, sir.
>
> "Q. Officer, did you have a conversation with this defendant regarding [the check]?

"A. Yes, sir.

"Q. State to the Court and jury what you said to him and what he said to you.

"A. I asked the defendant where he obtained the check. He informed me that on the morning of the 20th, between 10 and 11 a.m., I believe, he was at the office of the Montauk Trailways and that he solicited, to solicit money.

He told me he was refused and he saw a bank deposit bag on a cabinet there, that he took the bag with him when he left and there was checks in the bag, plus currency. He kept the currency and this one check and he destroyed the other checks.

"Q. Did he state to you the manner in which he was dressed on that day?

"A. Yes, sir. He told me he was dressed as a minister, with a Roman collar.

"Q. Did you question him further regarding his being a minister?

"A. I did ask him if he was an ordained minister. He informed me that he was but that he did not have any church or congregation.

"Mr. Browne: You may inquire.

"Mr. Brett: May I approach the bench, if your Honor pleases, for a side-bar conference, with the stenographer?

"The Court: Well, all right.

(The following occurred at the bench, out of hearing of the jury.)

"Mr. Brett: I object to the district attorney eliciting from the detective conversations with respect to the clerical garb. It appears to me that your Honor specifically suppressed such statements, in view of the fact that they concern clerical garb and physical evidence which, in and of itself, was suppressed by your Honor.

"The Court: Objection is overruled. The decision with respect to the suppression—my statements dealt with the question of those things that were seized illegally. Since they are not offered in evidence, they are not before the jury." (Trial transcript, pp. 65-67.)

Thus, it appears that despite his earlier ruling at the second suppression hearing, the trial judge allowed into evidence admissions by petitioner relating to the clerical garb.

Furthermore, it is unclear from the transcript of the first suppression hearing whether, the first judge did not in fact agree to suppress admissions relating to the check.

[7] "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."

[8] Not all confessions or admissions are tainted by an earlier or contemporaneous illegal search and seizure. "But, if it be established that there was an unlawful seizure . . . all declarations and statements under the compulsion of the thing so seized are affected by the vice of primary illegality." *Takahashi* v. *United States, supra* at 122. If the evidence seized in the unlawful search "induced" or "triggered" subsequent incriminating statements, "the statements thus affected would be so related to the illegal activity as to be inadmissible." *Barnett* v. *United States, supra* at 862.

The court does not overlook the fact that petitioner had a voluntariness hearing in 1968. Such a hearing would ordinarily adjudicate claims of psychological compulsion. Although the 1968 hearing did not in fact investigate the type of compulsion claimed here, it might be deemed a binding adjudication of any and all voluntariness issues. But the absence of any arguments that the admitted admissions were "triggered" by excluded evidence and admissions must be viewed as resulting from the New York Court of Appeals earlier ruling to the contrary. Relitigating a point decided by the highest State court would have constituted nothing more than an exercise in futile argumentation. See *Young* v. *State of Maryland,* 455 F.2d 679, 685 n. 2 (4 Cir.) (dissent), *cert. denied,* 407 U.S. 915 (1972), citing *People* v. *Bilderback,* 62 Cal.2d 757, 767, 44 Cal. Rptr. 313, 401 P.2d 921 (1965). In any case, the admissibility of petitioner's admissions is to be determined under fourth amendment, rather than fifth amendment standards. See, *e.g., United States* v. *Fallon,* 457 F.2d 15, 19 (10 Cir. 1972); see also W. Ringel, Searches & Seizures, Arrests and Confessions 141-42 (1972).

[9] The judge clearly disbelieved petitioner's testimony, which was the principal foundation for putting the voluntariness of petitioner's confession into question. This rejection of petitioner's testimony found expression in two places in the judge's memorandum.

> The defendant appeared to be of average intelligence or better when questioned on direct examination, but became evasive and feigned a lack of understanding on cross-examination, particularly when questioned as to his past criminal record. (Decision of February 5, 1968, p. 2.)

In view of the foregoing and in view of the demonstrated competence and experience of defendant's counsel, who was then on the staff of the Legal Aid Society and whom this Court knows to be an extremely able practitioner of the criminal law, based on the defendant's trial and the numerous other trials conducted by him before this Court, the Court can put no credence in defendant's testimony on this hearing that he never told his counsel of the coercion and promises which he now asserts because counsel "never asked him." (*Id.* at 3-4.)

[10] Section 165, which was then in force (now revised in § 120.90 of the Criminal Procedure Law), provides:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

[11] The rule established in cases such as *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), rendering inadmissible statements made during a period in which federal officers had failed to comply with a statutory directive does not govern this State case. The Supreme Court itself has characterized the rule as an exercise of its supervisory power rather than a holding of constitutional dimensions. *Culombe* v. *Connecticut*, 367 U.S. 568, 599-602 (1961).

Judgment.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

A Memorandum and Order of Honorable Edward R. Neaher, United States District Judge, having been filed on October 26, 1973, granting the petition for a Writ of Habeas Corpus, it is

ORDERED and ADJUDGED that the petition for a Writ of Habeas Corpus is granted and the petitioner will be released from custody unless the State of New York, within thirty (30) days of the date of this judgment, grants him a new trial.

Dated: Brooklyn, New York, October 30, 1973.

LEWIS ORGEL
Clerk

Approved:

EDWARD R. NEAHER
U.S.D.J.

FILED
In Clerk's Office
U. S. District Court E.D. N.Y.
Oct 30 1973

Time A.M.....

P.M.....

Notice of Appeal.

[SAME TITLE]

NOTICE IS HEREBY GIVEN that the Respondents hereby appeal to the United States Court of Appeals for the Second Circuit from the final order entered herein on October 30, 1973.

This appeal is taken pursuant to 28 U.S.C. § 1291.

Dated: New York, New York, November 13, 1973.

Yours, etc.,

LOUIS J. LEFKOWITZ
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State of New York

By
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To: MR. OSCAR LEE CHENNAULT
Petitioner Pro Se

Copy received (3)
George A. Gordon
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March 19, 1974